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No. 512

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES OF AMERICA

v.

ROBERT K. MALCOLM

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

This case comes before the Court on certificate from the Circuit Court of Appeals for the Ninth Circuit. The District Court for the Northern District of California rendered no opinion.

JURISDICTION

The certificate of the Circuit Court of Appeals for the Ninth Circuit was filed on October 13, 1930. Jurisdiction is conferred by Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS CERTIFIED

The questions certified are:

1. Under the applicable provisions of the Revenue Act of 1928, must the entire community income of a husband and wife domiciled in California be returned and the income tax thereon be paid by the husband?

2. Has the wife under Section 161 (a) of the Civil Code of California such an interest in the community income that she should separately report and pay tax on one-half of such income?

STATUTES INVOLVED

The relevant portions of the statutes involved are printed in the Appendix, *infra*, pp. 11–24.

STATEMENT

The certificate (R. 1) sets forth the facts as follows:

> Robert K. Malcolm and Esther Jarrett Malcolm are husband and wife and citizens of the United States. Since October 1, 1920, they have continuously maintained their domicile in the State of California. During the year 1928 Robert Malcolm received a salary of $3,600 for personal services rendered as an officer of the Liberty Farms Company, a California corporation. Under the laws of the State of California this income was community property. On March 1, 1929, the husband and wife filed separate returns of their income for Federal income tax purposes. Each reported one-

half of the salary of $3,600 received in 1928 by the husband, and each fully paid the amount shown to be due on the returns. It is admitted that all income taxes due from either husband or wife for the year 1928 have been fully paid if, as a matter of law, they had a lawful right to make such separate returns under the provisions of Sections 11, 12, and 51 of the Revenue Act of 1928.

After the husband had filed his income-tax return for the calendar year 1928, as set out above, the Commissioner, upon an audit and examination, determined that his return was incorrect in that the salary of $3,600 should have been reported by the husband alone, and an income tax paid thereon by him, instead of both husband and wife reporting it at $1,800 on each return. Accordingly the Commissioner determined against the husband a deficiency in income tax amounting to $18.39. An assessment in this amount was then made and collected from the husband, the plaintiff herein, together with interest amounting to $1.12. A claim for refund was thereafter filed and rejected by the Commissioner. From a judgment for this amount in plaintiff's favor the defendant has appealed.

SUMMARY OF ARGUMENT

In the case of *United States* v. *Robbins*, 269 U. S. 315, this Court held that a married man domiciled with his wife in the State of California should be

taxed upon all of the community income. Since the decision in that case amendments to the California statutes have materially changed the rights and interests of the spouses in community property. Under these statutes the interest of the wife in California does not differ materially from similar property interests in Washington, Arizona, Texas, and Louisiana, and we believe that the decision in this case is, therefore, controlled by the community-property cases decided by the Court on November 24, 1930, in which the laws of the latter States were considered. *Poe* v. *Seaborn, Goodell* v. *Koch, Hopkins* v. *Bacon,* and *Bender* v. *Pfaff,* Nos. 15, 106, 84, and 86, October Term, 1930.

ARGUMENT

In the case of *United States* v. *Robbins,* 269 U. S. 315, this Court held that under Section 210 of the Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057) a married man domiciled with his wife in the State of California should be taxed on all of the community income for the year 1918, including personal earnings of the husband and income from community property acquired before 1917.

The instant case involves taxation under Section 11 of the Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 791) upon community income in the State of California consisting of the husband's salary for the year 1928. The Revenue Acts of 1918 and of 1928 in identical language lay a tax

upon "the net income of every individual," and the *Robbins case* would control decision in the instant case if the statutes of California relating to community property have not been so amended with relation to the wife's interest in the husband's salary as to bring this case within the ruling of this Court in *Poe* v. *Seaborn*, No. 15, October Term, 1930, decided November 24, 1930. But the California statutes which relate to community income received during 1928 are materially different from those before the Court in the *Robbins case*.

Section 172, as it appeared in the California Civil Code of 1872, provided as follows:

> The husband has the management and control of the community personal property, with the like absolute power of disposition other than testamentary as he has of his separate estate.

Prior to 1917 this provision had been amended by the addition of two provisos (Statutes and Amendments to the Codes, 1891, p. 425; Statutes and Amendments to the Codes, 1901, p. 598) as follows:

> *Provided, however,* that he can not make a gift of such community property or convey the same without a valuable consideration, unless the wife, in writing, consent thereto:
>
> And provided, also, that no sale, conveyance, or encumbrance of the furniture, furnishings, and fittings of the home, or of the clothing and wearing apparel of the wife or minor children which is community property

shall be made without the written consent of the wife.

In 1917 Section 172, without change in substance, was made to relate exclusively to personal property. (Statutes and Amendments to the Codes, 1917, p. 829.) At the same time there was added a new provision, Section 172a, which dealt with community real property as follows:

> SEC. 172a. The husband has the management and control of the community real property, but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; *provided, however,* that the sole lease, contract, mortgage, or deed of the husband, holding the record title to community real property, to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate.

In 1921 Sections 172b, 172c, and 172d (*infra,* pp. 21–22) were enacted. These sections relate exclusively to the sale of community real estate in cases where either husband or wife has been adjudged insane.

In 1923 Sections 1401 and 1402 of the Civil Code (*infra*, pp. 23–24) were amended to provide that upon the death of either husband or wife one-half of the community property belongs to the survivor and one-half is subject to the testamentary disposition of the decedent; in the absence of a testamentary disposition the interest of the decedent passes to the surviving spouse. The community property passing from the control of the husband either by reason of his death or of his wife's testamentary disposition is subject to his debts, family allowances, and charges and expenses of administration.

Finally, in 1927, Section 161a of the Civil Code was enacted. This section provides:

> The respective interests of the husband and wife in community property during continuance of marriage relation are present, existing, and equal interests under the management and control of the husband as is provided in Sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

Section 172a was amended in 1927 (see p. 20, *infra*), the chief change being in connection with the limitation of one year on suits to avoid any instrument affecting property standing of record in the name of the husband alone.

We believe that under the California statutes as amended the rights and interests of the

wife in community income earned by the husband in 1928 do not differ materially from the wife's rights and interests in community income under the laws of Washington, Arizona, Texas, and Louisiana, and that the instant case is governed not by the *Robbins case* but by the decisions of this Court in *Poe* v. *Seaborn,* No. 15; *Goodell* v. *Koch,* No. 106; *Hopkins* v. *Bacon,* No. 84; and *Bender* v. *Pfaff,* No. 86, all on the docket of the October Term, 1930, and all decided November 24, 1930.

In California, on the death of either spouse his or her interest is subject to testamentary disposition as in Washington. The chief difference in this respect between the law in the two States is that in California in the absence of testamentary disposition, the interest of the deceased spouse goes to the surviving spouse, while in Washington it passes to the issue of the decedent. The husband in California can not make a gift of the community personal property without the written consent of his wife (Civil Code, Sec. 172), and the wife must join with the husband in executing any instrument conveying an interest in community real estate. (Civil Code, Sec. 172a.) And finally the interests of the husband and wife are declared by the legislature to be "present, existing, and equal." (Civil Code, Sec. 161a.) Although there are differences in detail between the rights of the wife in California and those of wives in Washington, Arizona, Texas, and Louisiana, we believe that it can not now be contended that the wife in Cali-

fornia is not the "owner" of one-half of the community property.

The income involved in the instant case was salary earned in 1928 after the enactment of the statutes referred to above, and, consequently, the question of who should pay the tax on other income is not presented in the instant case. The courts of California have held that the statutes outlined above do not affect the ownership of community property acquired before their passage. Thus, the 1917 amendments as to real estate do not affect community real estate acquired by husband and wife prior to that time. *Schubert* v. *Lowe,* 193 Cal. 291; *Staton* v. *Buster,* 79 Cal. App. 428. Nor do they apply to community real estate purchased after their adoption with community funds acquired prior thereto. *Roberts* v. *Wehmeyer,* 191 Cal. 601. In *Estate of Phillips,* 203 Cal. 106, it was held that the portion of Section 1401 of the Civil Code which gave the wife the right to make a testamentary disposition of one-half the community property could not apply to community property acquired by the spouses prior to its enactment. See also *McKay* v. *Lauriston,* 204 Cal. 557. And in *Stewart* v. *Stewart,* 204 Cal. 546, it was held that Section 161a of the Civil Code adopted in 1927 could have no effect on the ownership of community property acquired prior to its effective date.

The question of who should pay the tax on the income from community property acquired before

1917 is settled by the *Robbins* case. The question of who should pay the tax on the income from community property acquired since 1917 but before 1927 is not involved in the instant case and is still open for determination.

CONCLUSION

The questions certified by the Circuit Court of Appeals, which should be limited upon the facts recited in the certificate as having reference only to income consisting of earnings received in 1928, are submitted for the decision of this Court.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
SEWALL KEY,
HELEN R. CARLOSS,
Special Assistants to the Attorney General.
ERWIN N. GRISWOLD,
Attorney.

DECEMBER, 1930.

APPENDIX

UNITED STATES STATUTES

The Revenue Act of 1928, c. 852, 45 Stat. 791, 795, 796, 807–808, provides in part as follows:

> SEC. 11. NORMAL TAX ON INDIVIDUALS.—There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax equal to the sum of the following: * * * (U. S. C., Sup. III, Title 26, Sec. 2011.)
>
> SEC. 12. SURTAX ON INDIVIDUALS.—(a) *Rates of surtax.*—There shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows: * * * (U. S. C., Sup. III, Title 26, Sec. 2012.)
>
> SEC. 51. INDIVIDUAL RETURNS.—(a) *Requirement.*—The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—
>
> (1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;
>
> (2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and
>
> (3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) *Husband and wife.*—If a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income. (U. S. C., Sup. III, Title 26, Sec. 2051.)

CALIFORNIA STATUTES

California Civil Code (1872):

SEC. 136[1] (as amended). Though judgment or divorce is denied, the court may, in an action for divorce, provide for the maintenance by the husband, of the wife and children of the marriage, or any of them.

SEC. 137[2] (as amended). When an action for divorce is pending, the court may, in its discretion, require the husband or wife, as the case may be, to pay as alimony any money necessary to enable the wife, or husband, to support herself and her children, or to support himself and his children, as the case may be, or to prosecute or defend the action. When the husband or wife wilfully deserts the wife or husband, as the case may be, or when the husband or wife has any cause of action for divorce as provided in section 92 of this code, he or she may, without applying for divorce, maintain in the superior court an action against her or him

[1] Amended in 1905, Statutes and Amendments to the Codes, 1905, p. 634.

[2] Amended in 1927, Statutes and Amendments to the Codes, 1927, p. 441.

for permanent support and maintenance of himself or herself or of himself and children, or of herself and children. When the husband wilfully fails to provide for the wife, she may, without applying for divorce, maintain in the superior court an action against him for permanent support and maintenance of herself or of herself and children. During the pendency of an action for divorce the court may, in its discretion, require the husband or wife, as the case may be, to pay as alimony any money necessary for the prosecution of the action and for support and maintenance, and execution may issue therefor in the discretion of the court. The court, in granting the husband or wife permanent support and maintenance of himself or herself, or of himself and children or herself and children, in any such action, shall make the same disposition of the community property and of the homestead, if any, as would have been made if the marriage had been dissolved by the decree of a court of competent jurisdiction. The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked at the discretion of the court.

SEC. 139. Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife, for her support during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects.

SEC. 140[3] (as amended). The court may require the husband or wife, as the case may be, to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case.

SEC. 141. In executing the five preceding sections the court must resort:

1. To the community property; then,

2. To the separate property of the husband.

SEC. 142. When the wife has either a separate estate, or there is community property sufficient to give her alimony or a proper support, the court, in its discretion, may withhold any allowance to her out of the separate property of the husband.

SEC. 143. The community property and the separate property may be subjected to the support and education of the children in such proportions as the court deems just.

SEC. 146[4] (as amended). In case of the dissolution of the marriage by the decree of a court of competent jurisdiction, the community property, and the homestead, shall be assigned as follows:

1. If the decree be rendered on the ground of adultery, or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just.

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[3] Amended in 1927, Statutes and Amendments to the Codes, California, 1927, p. 441.

[4] As amended in 1874, Amendments to the Codes, California, 1873–1874, pp. 191–192.

2. If the decree be rendered on any other ground than that of adultery or extreme cruelty, the community property shall be equally divided between the parties.

3. If a homestead has been selected from the community property, it may be assigned to the innocent party, either absolutely, or for a limited period, subject in the latter case, to the future disposition of the court, or it may, in the discretion of the court, be divided, or be sold and the proceeds divided.

4. If a homestead has been selected from the separate property of either, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party.

SEC. 147[4] (as amended). The court, in rendering a decree of divorce, must make such order for the disposition of the community property, and of the homestead, as in this chapter provided, and, whenever necessary for that purpose, may order a partition or sale of the property and a division or other disposition of the proceeds.

SEC. 148[4] (as amended). The disposition of the community property, and of the homestead, as above provided, is subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court.

SEC. 158. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between

[4] As amended in 1874, Amendments to the Codes, California, 1873–1874, pp. 191–192.

themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts.

SEC. 159[5] (as amended). A husband and wife can not, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation.

SEC. 160. The mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in the last section.

SEC. 161. A husband and wife may hold property as joint tenants, tenants in common, or as community property.

SEC. 161a.[6] The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided by sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

SEC. 162. All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.

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[5] As amended in 1874, Amendments to the Codes, California, 1873–1874, p. 193.

[6] Enacted in 1927, Statutes and Amendments to the Codes, California, 1927, p. 484.

SEC. 163. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property.

SEC. 164 [7] (as amended). All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing the presumption is that the same is her separate property, and if acquired by such married woman and her husband, or by her and any other person, the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; and the presumptions in this section mentioned are conclusive in favor of a purchaser, encumbrancer, payor, or any other person dealing with such married woman, in good faith and for a valuable consideration. In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property, as follows: As to conveyances

[7] Enacted in 1927, Statutes and Amendments to the Codes, California, 1927, pp. 826–827.

heretofore made, from and after one year from the date of the taking effect of this act; and as to conveyances hereafter made, from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

SEC. 165. A full and complete inventory of the separate personal property of the wife may be made out and signed by her, acknowledged or proved in the manner required by law for the acknowledgment or proof of a grant of real property by an unmarried woman, and recorded in the office of the recorder of the county in which the parties reside.

SEC. 166[8] (as amended). The filing of the inventory in the recorder's office is notice and prima facie evidence of the title of the wife.

SEC. 167[8] (as amended). The property of the community is not liable for the contracts of the wife, made after marriage, unless secured by a pledge or mortgage thereof executed by the husband.

SEC. 168. The earnings of the wife are not liable for the debts of the husband.

SEC. 169. The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife.

SEC. 170. The separate property of the husband is not liable for the debts of the wife contracted before the marriage.

SEC. 171[9] (as amended). The separate property of the wife is liable for her own

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[8] As amended in 1874, Amendments to the Codes, California, 1873–1874, p. 193.

[9] Amended in 1915, Statutes and Amendments to the Codes, California, 1915, p. 920.

debts contracted before or after her marriage, but is not liable for her husband's debts; provided, that the separate property of the wife is liable for the payment of debts contracted by the husband or wife for the necessaries of life furnished to them or either of them while they are living together; provided, that the provisions of the foregoing proviso shall not apply to the separate property of the wife held by her at the time of her marriage or acquired by her by devise, succession, or gift, other than by gift from the husband, after marriage.

SEC. 171a[10] (as amended). For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist.

SEC. 172[11] (as amended). The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he can not make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

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[10] Added in 1913, Statutes and Amendments to the Codes 1913, p. 217.

[11] Amended in 1917, Statutes and Amendments to the Codes, California, 1917, p. 829.

SEC. 172a [12] (as amended). The husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.

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[12] Amended in 1927, Statutes and Amendments to the Codes, California, 1927, p. 827.

SEC. 172b.[13] Where real property is held as community property, and either the husband or wife has been adjudged insane or incompetent, the husband or wife not insane or incompetent may petition the superior court of the county in which such community real property is situated for an order permitting the husband or wife, not insane or incompetent, to sell and convey, mortgage or lease, such community real property to raise moneys to provide for the support and care either of the sane or insane or incompetent spouse, or of their minor children, and also to raise moneys for the payment of the necessary taxes, interest and other charges incurred and required to be paid for the protection and preservation of the community estate and whenever it appears it is for the advantage, benefit, and best interests of the spouses, the estates, or their dependents. Such petition must be subscribed and sworn to by the applicant, setting forth the name and age of the insane or incompetent husband or wife; a description of the premises constituting the community real property petitioned to be sold, mortgaged, or leased; the value of same; the county in which it is situated; and such facts, in addition to the insanity or incompetency of the husband or wife, relating to the circumstances and necessities of the applicant and his or her family as he or she may rely upon in support of the petition.

SEC. 172c.[13] Notice of the application for such order must be given by publication of the same in a newspaper published in the county in which such community real prop-

[13] Enacted in 1921, Statutes and Amendments to the Codes, 1921, pp. 91–92.

erty is situated, if there is a newspaper published therein, once each week for three successive weeks, prior to the hearing of such application * * *.

SEC. 172d.,[14] If it appears to the court that such husband or wife has been adjudged insane or incompetent, the court may make an order permitting the husband or wife, not insane or incompetent, to sell and convey, or mortgage or lease such community real property, and thereafter any sale, conveyance, mortgage or lease, made in pursuance of such order is as valid and effectual as if the property affected thereby was the absolute property of the person making such sale, conveyance, mortgage or lease. If a sale is ordered it must be reported to and confirmed by the court.

SEC. 173. No estate is allowed the husband as tenant by courtesy [curtesy] upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband.

SEC. 174[15] (as amended). If the husband neglect to make adequate provision for the support of his wife, except in the cases mentioned in the next section, any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband.

SEC. 175[15] (as amended). A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him; nor is he liable for her support

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[14] Enacted in 1921, Statutes and Amendments to the Codes, 1921, pp. 91–92.

[15] As amended in 1874, Amendments to the Codes, 1873–1874, pp. 193–194.

when she is living separate from him, by agreement, unless such support is stipulated in the agreement.

SEC. 176[15] (as amended). The wife must support the husband, when he has not deserted her, out of her separate property, when he has no separate property, and there is no community property, and he is unable, from infirmity, to support himself.

SEC. 177. The property rights of husband and wife are governed by this chapter, unless there is a marriage settlement containing stipulations contrary thereto.

SEC. 178. All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved.

SEC. 179. When such contract is acknowledged or proved, it must be recorded in the office of the recorder of every county in which any real estate may be situated which is granted or affected by such contract.

SEC. 180. The recording or nonrecording of such contract has a like effect as the recording or nonrecording of a grant of real property.

SEC. 1401[16] (as amended). Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of section one thousand four hundred two of this Code.

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[15] As amended in 1874, Amendments to the Codes, 1873–1874, pp. 193–194.

[16] Amended in 1923, Statutes and Amendments to the Codes, California, 1923, pp. 29–30.

SEC. 1402[17] (as amended). Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to administration, his debts, family allowance and the charges and expenses of administration; but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage and deal with the community personal property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect. After forty days from the death of the wife, the surviving husband shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property, specifying it, is claimed by another under the wife's will.

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[17] Amended in 1923, Statutes and Amendments to the Codes, California, 1913, pp. 29–30.

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